



Memorandum

TO: MAYOR AND CITY COUNCIL

FROM: Vice-Mayor Judy Chirco
Councilmember Sam Liccardo
Councilmember Pierluigi Oliverio
Councilmember Nancy Pyle

SUBJECT: FUNDING RECOMMENDATIONS
FOR NEW PARK FACILITIES

DATE: November 11, 2010

APPROVED *Judy Chirco* *Nancy Pyle* *Pierluigi Oliverio*
PH *KS* *by D.F.*
RECOMMENDATION

Accept staff recommendation with the following modifications:

1. Implement a pilot program for the parks identified as “fully funded” in staff’s memo, through December 31, 2011, to authorize staff to:

- (1) Implement “Alternative B” – to allow park projects proceed through design and construction with non-General Fund dollars utilized for a three-year “establishment period,” but only where a longer-term plan can be implemented for funding maintenance.
- (2) Concurrent with, or in lieu of, “Alternative B,” proceed with negotiations with any willing developer under “Alternative A,” to waive some portion of a development’s PDO/ PIO fees where that developer contributes the same or substantially similar amount to a fund--e.g., a “maintenance trust” established through the San José Parks Foundation—restricted to pay for maintenance and operations for that park for a minimum of 10 years.

2. Restrict staff’s proposed modification of the prevailing wage policy for developer-financed maintenance of parks to those circumstances in which the developer has not benefitted from any waiver, reduction, or compensation for development fees, ^{or} and when maintenance services are provided solely by a donor such as a Homeowners Association or neighborhood volunteer organization.

ANALYSIS

3-Year “Establishment Periods” vs. Longer-Term “Maintenance Trusts”

Although the staff expresses a preference for a 3-year “establishment period” (Alternative B) over the proposal suggested by Councilmembers Liccardo and Oliverio (Alternative A), staff’s memorandum reveals that the two proposals face the same legal risks (Indeed, if anything, the legal risks of Alternative A are lessened by the fact that no PDO or PIO money will be expended for non-capital purposes). The options also have a nearly identical drawback: the diversion of park capital money.

The great shortcoming in Staff's approach, however, lies in its near-term focus. A three-year "establishment period" will leave us with a park covered in weeds and daffodils by Year Four. Our current fiscal crisis has grown more acute with last week's announcement of a \$70 million deficit, and the Budget Director's projections have us running deficits and cutting staff for at least the next half decade. All that time, park maintenance staff will shrink.

We need a more sustainable, long-term approach, one that avoids ongoing future fiscal burdens by taking future parks "off the grid" of our General Fund. For that reason, we return to the notion of allowing developers to waive portions of their fees, in exchange for the funding of "maintenance trusts" that will provide longer-term solutions.

This approach need not operate to the exclusion of Staff's option. Indeed, we could implement staff's three-year "establishment period" while concurrently having a developer contribute to a fund within the San José Parks Foundation that would provide 15 or 20 years of funding for ongoing maintenance. Allowing the corpus of the fund to generate interest or investment returns four three years could enable us start something of an endowment, that is, relying on earnings to maintain the park, without reducing the corpus of the developer's investment.

Prevailing Wage

The ambiguity of staff's proposal to modify the prevailing wage requirements invites needless battles. Simply, any contribution that amounts to a true "donation" should remain unfettered by regulatory restrictions. In contrast, developer concessions given concurrent with or subsequent to the receipt of a governmental benefit--such as a fee waiver or reduction-- should not entitle the developer to avoid the City's longstanding prevailing wage policy.

The Costs—and Risks—of Doing Nothing

Above all, though, the Council must not miss this opportunity to act.

Lacking in Staff's memorandum is any significant analysis of the substantial cost of inaction. Although great pains have been taken to familiarize us with the legal risks of utilizing Quimby Act or Mitigation Act fees for non-capital purposes—and, by the way, we don't propose doing so--it would also help to understand the risks of simply following our current course, without alteration.

The current council policy essentially states: "don't build the park if we can't pay to maintain it." We don't argue with that approach; it's sensible. If we continue to remain unable to expand our low level of investment in maintenance—likely, for a decade or longer—we won't be building many parks. Indeed, but for those very extraordinary cases in which parks can be maintained by a true "donation" (through a commitment of homeowner dues, or some other manna from heaven), *there won't be a single public park constructed in the entire City of San Jose for at least half of a decade-- and probably longer.*

What legal consequences do we face as a result of doing nothing? In 2006, the Homebuilders Association issued a memorandum to the City challenging the retention of unspent funds in the Park Trust Fund. In 2010, a developer sent the City a Public Records Act request for the PDO/PIO fee balance for each council district, an obvious attempt to assess the legal viability of challenging the

City's failure to build any parks with its tens of millions of reserved PDO/PIO fees. With the issuance of the PRNS Director's Park Trust Fund Annual Report in February of 2010, the City had an outstanding balance of \$81.7 million of PDO and PIO fees, and that number will grow in the near term, with nary a blade of grass being planted on any land.

Of additional concern is that the Quimby Act itself states: "The city, county, or other local public agency to which the land or fees are conveyed or paid ***shall develop a schedule specifying how, when, and where it will use the land or fees, or both, to develop park or recreational facilities to serve the residents of the subdivision . . .***" Our current policy of placing parks "on hold" indefinitely runs contrary to this directive. Without a specific schedule on how, when and where we will use these funds, the City's burgeoning parks fund will become a large, fat target for any litigious developer.

Moreover, what political and economic consequences do we face as a result of doing nothing? How can we explain to a community that their neighborhood should absorb a new high-density, 100 DU/AC development if the long-promised park won't get built for another generation? Future development will become increasingly unpalatable and politically untenable become in a City where no quality-of-life improvements will accompany that development.

On three occasions, the City has enacted policies that vary from a strictly uniform application in PDO/PIO fees (reducing fees for high-rises, affordable units, and secondary units), yet nary a lawsuit has been filed against the City.

Here, we happily face that rare decision in which the risks of doing nothing far outweigh the risk of moving forward in a way that will better serve our City. Let's move forward.